

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.20 OF 2006

Pravin Ratilal Share & Stock Brokers Ltd. ... Petitioner

vs.

Sagar Drugs & Pharmaceuticals Ltd. & another. ... Respondents.

Ms.Rajani Iyer with Zal Andhyarujina i/b. M/s.Maneksha & Sethna, for
Petitioner.

Mr.V.R.Dhond i/b. Crawford Baylay & Co. for Respondent no.1.

CORAM: D.K.DESHMUKH,J.

DATED: 26th September,2006

P.C.:-

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, the petitioner challenges the Award made by the Arbitral Tribunal directing the petitioner to pay the amount of Rs.48,00,000/- (Rupees Forty Eight lakhs only) to the respondent no.1. The learned Counsel appearing for petitioner submits that the claim made by the respondent no.1 before the Arbitral Tribunal was barred by the Law of Limitation. It is submitted that the Arbitral Tribunal has

held that the claim is not barred by the law of limitation because the claim is based on the current and running account maintained by the respondent no.1 and that last payment was made on 23.9.2003. The learned Counsel submits, by pointing out the provisions of sub-section (4) of Section 2 of the Arbitration Act, that the provisions of the Limitation Act are not applicable to the arbitration held under the bye-laws of National Stock Exchange and therefore, the period of limitation would be governed by the bye laws of the National Stock Exchange and the bye-laws of National Stock Exchange do not permit institution of claim on any running account. Under the bye-laws of National Stock Exchange, the period of limitation starts on the date on which the claim, difference or dispute arises. The learned Counsel submits that in the present case on showing by respondent no.1 itself, the petitioner raised dispute as per the letter dated 18.11.2003 and the reference of dispute was made on 22.11.2004. The period of limitation is six months from the date on which the cause of action arises. The learned Counsel therefore, submits that the Award of the Arbitrators suffers from total non application of mind and for this sole reason the Award is liable to be set aside.

2. The learned Counsel appearing for respondent no.1 on the other hand contends that the Arbitrators have decided the objection raised regarding limitation in the Award holding that the claim of the

respondent no.1 is not barred by the law of limitation. According to the learned Counsel, after the petitioner refused to make payment on 18.11.2003, an application was made to the Chairman of National Stock Exchange on 19.2.2004. Thus, according to the learned Counsel the complaint was pending on the date on which the reference was made i.e. on 22.11.2004 and therefore, in terms of the provisions of the bye-laws of National Stock Exchange the time taken by the Chairman of National Stock Exchange will have to be excluded.

3. The learned Counsel appearing for respondent no.1 further submits that it is true that there are no pleadings on record showing that as to when the complaint made by the respondent no.1 to the Chairman of the National Stock Exchange was disposed of. It is also true that in the Rejoinder that was filed by the respondent no.1, it is not claimed that the period spent in prosecuting the complaint made before the Chairman, National Stock Exchange, is liable to be excluded. But still in view of the provisions of sub-section (3) of Section 43 of the Act the Respondent no.1 is entitled to an order from this Court for extension of time to make reference because according to the learned Counsel, otherwise undue hardship would be caused to the respondent no.1.

4. Now from the record it is clear that the objection raised by

the petitioner that the reference made by respondent no.1 is barred by law of limitation has been decided by the Arbitral Tribunal by making observations in paragraph 8(ii) to the Award. Paragraph 8(ii) reads as under:-

“8(ii) We do not accept the Respondent's argument that the claim is barred by limitation as according to the Respondent the same is not filed within six months from the date of the last transactions and hence, the claim as filed is time-barred is an arguments which deserve to be rejected. So far as this reference is concerned, we are of the opinion that the disputes between the parties cannot be said to have arisen in respect of particular transaction. As from the perusal of the account of the Applicant as maintained by the Respondent, the same is running account, the last payment in respect of the Applicant's dues was made on 23rd September,2003. Since a dispute does not pertain to any particular transaction, but is in respect of running account in which payment has been made by the Respondent from time to time, dues have been acknowledged by the Respondent by making several payments. The limitation in respect thereof will run for a period of three years from the date of the last transaction which is September,2003. In the light of the Judgement of Justice Dr.D.Y.Chandrachud J., as reported in 2003 Bom CR

Pg.488. The account being a running account, the reference is filed within a period of three years. We are of the opinion that the claim submitted to NSE is therefore, no barred by limitation and is maintainable.”

Sub section (4) of Section 2 of the Arbitration Act reads as under:-

“2 (4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.”

Thus, the provisions of Section 43 of the Act are not applicable to the statutory arbitration. Sub-section (1) of Section 43 of the Act lays down that the Limitation Act shall apply to arbitrations as it applies to proceedings in court. Therefore, so far as the period of limitation for making reference is concerned, it will be governed only by the bye-laws of the National Stock Exchange of India Ltd. Bye-law no.3 in Chapter XI of the National Stock Exchange of India Ltd. which is relevant for the present purpose. It reads as under:-

“Limitation period for reference of claims,

differences or disputes for arbitration.

3. All claims, differences or disputes referred to in Bye laws (1), 1(A), (1B) and (1D) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the Relevant Authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months.”

It is clear from the above bye-law that in the above matter the cause of action for making reference under the bye-law accrues when the dispute, claim or difference arises. According to the pleadings of the respondent no.1 which are to be found in its rejoinder wherein Respondent no.1 states thus:

“It is only after 30.9.2003, that no amount was coming forth from the Respondent Company. Immediately thereafter, the Applicant Company took steps for the recovery of its outstanding dues, by addressing a statutory notice dated 20.10.2003, through its advocate. And when the Respondent Company refused to make payment as per the notice, vide its letter dated 18.11.2003 (which was the first time when a “dispute” was raised by the Respondent Company), the Applicant Company immediately took steps by making a complaint to

the National Stock Exchange of India Ltd. ('NSE' for short) vide its letter dated 19.2.2004. Therefore, the Applicant Company has invoked jurisdiction of NSE well within the period of limitation.”

According to the Respondent no.1, thus, the dispute arose between the parties on 18.11.2003 when the petitioner refused to make payment. A reference has been made admittedly on 22.11.2004. If one goes by the pleadings of the Respondent no.1, it was claiming that it has invoked the arbitration clause when Respondent no.1 made complaint in the National Stock Exchange on 19.2.2004. Even, the learned Counsel appearing for Respondent no.1 did not claim that addressing the complaint to NSE on 19.2.2004 amounts to invoking arbitration clause. Therefore, if one goes by the pleadings of the respondent no.1 that dispute arose on 18.11.2003, as reference has not been made within a period of six months from that date it would be barred by law of limitation. The learned Counsel appearing for respondent no.1 submits that the time taken by the relevant authority to administratively resolve the claim can be excluded. According to the learned Counsel, therefore, this Court should make an order under sub-section (3) of Section 43 of the Arbitration Act extending the period of limitation. I have serious doubt in my mind as to whether the provisions of sub-section (3) of Section 43 of the Act are available to

respondent no.1. Even assuming that the provisions are available, in my opinion, the order under that provision can be made if the Court is satisfied that otherwise undue hardship is likely to be caused to the party concerned. In so far as the present case is concerned, if the Respondent no.1 wanted to claim that the period spent by it in prosecuting its complaint in NSE is liable to be excluded from computing the period of limitation, it was open to Respondent no.1 to plead before the Arbitral Tribunal and then establish that fact before the Arbitral Tribunal. The respondent no.1 has not given any reason as to why he did not do so before the Arbitral Tribunal. In my opinion, therefore, it cannot be said that in this case the Court has to exercise its power under sub-section (3) of Section 43 of the Act in order to prevent undue hardship being caused to the respondent no.1. In case power under sub-section (3) of section 43 of the Act is available to the Court, it would be properly exercised by the Court where the Court finds that the party would suffer harsh consequences for no fault of his even after he had taken all possible measures within his power. In the present case merely because the Respondent no.1 has failed to put up proper pleadings, it cannot be said that the power of the Court under Section 43(3) of the Act can be exercised. In any case I do not find that the application has been made in due course invoking the jurisdiction of this Court under sub-section (3) of Section 43 of the Act. Taking overall view of the matter therefore, as I find that reasons given by the Arbitral

Tribunal for holding that the claim raised by the respondent no.1 is barred by law of limitation are not proper and according to law, I have no option but to set aside the Award. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. Respondent no.1 to pay cost of this petition to the petitioner as incurred by the petitioner. However, it is clarified that the petitioner is free to prosecute such remedy as may be available to him under the law.
